STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 12, 2007
v	No. 267373 Macomb Circuit Court
JULIE CHRISTINE LAEL BAUMER, Defendant-Appellant.	LC No. 2004-002096-FH

Before: Wilder, P.J., and Sawyer and Davis, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction of first-degree child abuse, MCL 750.136b(2), and her sentence of 10 to 15 years' imprisonment. We affirm.

The victim in this case was born to defendant's sister on August 16, 2003. The birth mother's own problems resulted in the victim requiring neo-natal intensive care for a week after his birth, and the birth mother subsequently gave the victim to defendant to raise. The victim appeared healthy at his medical checkups on August 29, 2003, and on September 23, 2003. Defendant acknowledged that the victim was in her sole custody from September 28, 2003, until October 3, 2003, when she took him to the emergency room with complaints that he had a poor appetite, refused to eat, and was very fussy. According to the attending emergency room doctor, on arrival the victim was in a coma, severely dehydrated, hypoglycemic, in kidney failure, and anemic. The victim was transferred to a specialized pediatric intensive care unit, where he underwent surgery for severe brain trauma and a skull fracture. The chief of pediatric neurosurgery at the hospital opined that the injuries were inflicted within 12 to 24 hours of the victim's examination, and he stated that the injuries were among the ten worst he had seen in his twenty years of experience. A pediatric radiologist with eighteen years of experience opined that the injuries had been inflicted within 48 hours, but more likely within 24 hours, of the initial CT and MRI scans, and the victim could not have survived six days without medical care. Both opined that the victim's injuries were inconsistent with an accidental fall; and the radiologist opined that they were best explained by blunt force trauma and shaking. The victim survived, but he is permanently severely disabled.

Defendant first argues that the trial court erred in denying her motion to suppress a statement she made during the course of her polygraph examination. We disagree. We review de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). However, we will not disturb a trial court's factual

findings at a *Walker*[1] hearing unless they are clearly erroneous. *Id*. A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that the trial court made a mistake. *Id*. at 564.

Notwithstanding the fact that it may be used as an investigative tool, the results of a polygraph examination are not admissible at trial. *People v Ray*, 431 Mich 260, 265-267; 430 NW2d 626 (1988). However, if statements made by the defendant before, during, or after the examination can be disassociated from the underlying test, the statements themselves are admissible. *Id*. at 266-268. The touchstone is whether, under the particular facts of the specific case, the defendant understood the distinction between the statements and the examination itself, and the defendant knowingly, intelligently, and voluntarily waived his or her Fifth Amendment rights. *Id*. "To establish that a defendant's waiver of h[er] Fifth Amendment right was knowingly and intelligently made, 'the state must present evidence sufficient to demonstrate that the accused understood that [s]he did not have to speak, and that the state could use what [s]he said in a later trial against h[er].'" *People v Tierney*, 266 Mich App 687, 709; 703 NW2d 204 (2005), quoting *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996) (Boyle, J.). Here, defendant contends that she was confused by the examining police officer's provision of waiver forms, and as a result she believed that the statements she made during the polygraph examination would not be used against her.

We believe defendant was adequately appraised of her rights and the consequences of her actions. Defendant was provided with two independent forms: a "consent and release" form and an "advise [sic] of rights" form. The former specifies that "the result (truthful, deceptive, inconclusive" of a polygraph examination is not admissible as evidence," but that polygraph testing is voluntary and the results would be "made available to the proper authorities." The latter states that "you are now being questioned as to any information you may have pertaining to an official police investigation," and it set forth five individually-listed rights, the second of which was "anything you say or write may be used against you in a court of law." The examining officer went over each form with defendant, and he explained that while the result of the polygraph examination was inadmissible in court, anything she said could be used against her in court. Defendant acknowledged that she understood her rights by signing both forms, and nothing in the record supports that she was confused. We see nothing in the record from which we could conclude that the trial court erred in determining that defendant knowingly, intelligently, and voluntarily waived her *Miranda*[2] rights. Accordingly, the trial court did not err in denying defendant's motion to suppress.

Defendant next argues that the trial court abused its discretion in admitting the expert testimony of two doctors concerning the timing of the victim's injuries. We disagree.

We review for an abuse of discretion a trial court's decision to admit expert witness testimony. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004). We also review a trial court's decision on an expert's qualifications for an abuse of discretion. See *Woodard v*

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[1] *People v Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Custer, 476 Mich 545, 557; 719 NW2d 842 (2006). A trial court abuses its discretion when its decision falls outside of the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The proponent of evidence bears the burden of establishing relevance and admissibility. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). The court may admit evidence only once it ensures that the expert testimony meets the standards of reliability propounded in MRE 702. *Gilbert*, *supra* at 782. Our Supreme Court has explained:

> MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Id*.]

As discussed, the chief of pediatric neurosurgery and a pediatric radiologist respectively opined that the victim's injuries had been inflicted within 12 to 24 and within 48 but more likely within 24 hours of the examination. Defendant contends that neither was qualified to render an opinion on the timing of the victim's injuries because they had received no specific training in the timing of head injuries. However, MRE 702 permits an expert to be qualified on the basis of knowledge, skill, experience, training, *or* education. Both of these doctors had extensive experience and had accumulated knowledge sufficient to qualify them as experts, despite their lack of specific training regarding the timing of injuries. The trial court did not abuse its discretion in finding the experts qualified under MRE 702. See *Woodard*, *supra*, 476 Mich at 557.

Moreover, the prosecutor demonstrated that one doctor based his opinion on the victim's physical presentation and the initial CT scan, and the other doctor based her opinion on two CT scans and the MRI scan, which are viewed as legitimate sources of data in the medical field. *Gilbert*, *supra* at 782. The prosecutor also demonstrated that their opinions were reached by applying reliable medical principles and methodology to analyze and interpret the diagnostic tools available to them. *Id*. Accordingly, the trial court did not abuse its discretion in allowing the doctors to offer their expert opinions regarding the timing of the injury, where their knowledge and experience qualified them to render opinions based on their interpretations of the CT and MRI scans of the victim.

Defendant next argues that there was insufficient evidence to sustain her conviction. Specifically, defendant argues that the victim's injuries could have occurred when the victim was in the care of other family members. We disagree.

We review de novo challenges to the sufficiency of the evidence to determine whether, when viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found all the elements of the charged crime to have been proven beyond a reasonable doubt. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). We will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of a crime, and all conflicts in the evidence must be resolved in favor of the prosecution. *Id*. Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but must only introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002). It is for the jury to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *Id*. at 428.

A person is guilty of first-degree child abuse if the person "knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). See *People v Maynor*, 470 Mich 289, 293-294; 683 NW2d 565 (2004). "[F]irst-degree child abuse requires the prosecution to establish . . . not only that defendant intended to commit the act, but also that defendant intended to cause serious physical harm or knew that serious physical harm would be caused by her act." *Id*. at 291.

It is not disputed that the victim was in defendant's sole custody for five consecutive days before she brought him to the hospital. Two doctors at the hospital opined that the injuries likely occurred within 24 hours of arrival at the hospital, and one testified that if the victim's injuries had occurred before he was in defendant's custody, he would have died before he reached the hospital. Defendant presented testimony from a pediatric forensic pathologist who disagreed with the opinions of the other doctors regarding timing and suggested that it was possible the victim had sustained the trauma during birth. However, the prosecution was not required to negate defendant's theory that the injuries to the victim occurred before he was in her sole custody. *Hardiman*, *supra* at 423-424. Given the victim's clean bills of health at his checkups and the timing testimony of the two doctors presented by the prosecution, when the evidence is viewed in the light most favorable to the prosecution, sufficient circumstantial evidence was presented from which the jury could reasonably infer that defendant knowingly or intentionally caused serious physical harm to the victim.

Defendant next argues that she was denied the effective assistance of counsel. We disagree. Defendant did not move for a new trial or *Ginther*[3] hearing in the trial court, so our review is limited to mistakes apparent on the record. *People v Sabin* (*On Second Remand*), 242

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Mich App 656, 658-659; 620 NW2d 19 (2000). To prove ineffective assistance of counsel, defendant must show that her counsel's performance was deficient, and that there is a reasonable probability that, but for that deficient performance, the result of the trial would have been different. *Matuszak*, *supra* at 57-58. Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id*. at 58.

Defendant argues that her attorney was ineffective for failing to investigate, and for waiving the defense, that the victim's injuries occurred during birth. Specifically, defendant argues that defense counsel should have employed this defense by introducing the birth doctor and the childbirth medical records, including fetal monitoring strips and evidence that the victim's mother was given Pitocin to facilitate childbirth. However, a review of the record reveals that defense counsel thoroughly investigated this defense before trial, and ultimately determined, based on the defense expert's examination of the fetal monitoring strips, that birth trauma due to Pitocin was not a viable defense in this case. Decisions regarding what evidence to present are presumed to be a matter of trial strategy, which we will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Given the additional fact that the victim's checkups were positive, we cannot deem it an unsound strategy to abandon a birth trauma defense and instead contend that the injuries were sustained while the victim was in the care of another family member. That the strategy did not work does not constitute ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant finally argues that the trial court erred in departing upward from the legislative sentencing guidelines. Defendant's sentencing guidelines range was 57 to 95 months' imprisonment. The trial court followed the recommendations of the prosecutor and the presentence investigation report and sentenced defendant to 10 to 15 years' imprisonment on the ground that certain factors in this case were not adequately taken into account by the legislative guidelines. We find no error in the trial court's decision to do so.

A trial court is required to choose a minimum sentence within the recommended minimum sentence range under the legislative guidelines unless the trial court articulates on the record a substantial and compelling reason for departing from the range and why the reason justifies the departure. *Babcock*, *supra* at 272; *People v Havens*, 268 Mich App 15, 17; 706 NW2d 210 (2005); MCL 769.34(3). A substantial and compelling reason must be objective and verifiable, must keenly or irresistibly grab the court's attention, and must be of considerable worth in deciding the length of a sentence. *Babcock*, *supra* at 272. To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed. *Havens*, *supra* at 17. A trial court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds that the characteristic has been given inadequate or disproportionate weight. *Babcock*, *supra* at 272. If a trial court departs from the guidelines range, and its sentence is not based on a substantial and compelling reason to justify the particular departure, i.e., the sentence is not proportionate to the seriousness of the defendant's conduct and her criminal history, we must remand to the trial court for resentencing. *Id*. at 273.

The existence or nonexistence of a particular sentencing factor is a factual determination to be determined by the trial court, so we review its existence for clear error. *Babcock*, *supra* at

273. We review de novo the determination that a particular sentencing factor is objective and verifiable. *Id.* We review for an abuse of discretion a trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence. *Id.* at 274. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes. *Id.*

Defendant first objects to the trial court's determination that the jury implicitly found that there was a very high level of brutality involved in this case. The trial court's determination is correct, based on the plain language of the statute, which requires a finding that the defendant knowingly or intentionally caused *serious physical harm* to a child. The severe nature of the injuries sustained by the victim refute her assertion that excessive brutality did not exist in this case. Further, the excessive brutality with which the injuries were inflicted is objective and verifiable, in that it is capable of being confirmed by the victim's medical records. *Havens*, *supra* at 17.

Defendant next argues that the physical injury to the victim, the psychological injury to the victim, the aggravated physical abuse inflicted on the victim, and the exploitation of the victim's vulnerability were already taken into account by the offense variables as scored.[4] While the trial court found that those factors were taken into account in determining the guidelines range, it found that those factors were given inadequate weight. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. *Havens*, *supra* at 18; MCL 769.34(3)(b). These factors were indeed already accounted for by the offense variables, but the trial court did not err in concluding that those factors were given inadequate weight.

Under MCL 777.33(1)(c) (OV-3), concerning physical injury to a victim, 25 points are to be assessed if "[l]ife threatening or permanent incapacitating injury occurred to a victim." Under MCL 777.37(1)(a) (OV-7), concerning aggravated physical abuse, 50 points are to be assessed if "[a] victim was treated with terrorism, sadism, torture, or excessive brutality." Under MCL 777.40(1)(b) (OV-10), concerning exploitation of a vulnerable victim, 10 points are to be assessed if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." These offense variables were properly scored based on the victim's life-threatening and permanently incapacitating injuries, excessively brutal treatment, and exploitation as a youth in a domestic relationship with defendant. The catastrophic nature of the injuries, the excessive brutality with which they were inflicted, and the exploitation of the victim's vulnerability at six weeks of age lead us to conclude that the trial court did not err in concluding that the sentencing guidelines did not adequately account for the facts of the case, that those factors keenly or irresistibly grabbed

[4] We note that defendant does not argue that any of these reasons were not objective or verifiable. We also note that, contrary to defendant's assertion, the trial court did not indicate that the psychological injury to the victim was given inadequate weight.

the court's attention, and that those factors were of considerable worth in deciding an appropriate sentence length.

The trial court also determined that taking into account the above-referenced substantial and compelling reasons would contribute to a more proportionate criminal sentence than was available within the guidelines range. *Id*. Our Supreme Court has instructed that "if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the seriousness of [her] criminal history, the trial court should depart from the guidelines." *Id*. at 264. Here, the trial court felt that a sentence within the guidelines range of 57 to 95 months' imprisonment was not proportionate to the seriousness of the offense and the offender. The trial court's upward departure of just over two years is an outcome falling within the permissible principled range of outcomes; therefore, defendant's sentence did not constitute an abuse of discretion. *Id*. at 274.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Alton T. Davis